No. 2499.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

POWER AND IRRIGATION COMPANY OF CLEAR LAKE, a Corporation, organized and existing under the laws of the State of Arizona,

Plaintiff in Error,

vs.

BANK OF WOODLAND, a Corporation; STEPHENS AGRICULTURAL AND LIVESTOCK COMPANY, a Corporation; JOSEPH CRAIG, P. N. ASHLEY, J. L. STEPHENS, J. J. STEPHENS, L. D. STEPHENS and N. A. HAWKINS,

Defendants in Error.

BRIEF OF APPELLANT.

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Filed this.....day of March, 1915.

F. D. MONCKTON, Clerk,

By....., Deputy Clerk.

THE JAMES H. BARRY CO

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STATEMENT OF FACTS.

This is an appeal from a judgment dismissing plaintiff's complaint for alleged want of jurisdiction. The facts are as follows:

On January 19, 1907, defendants in error agreed in

writing to sell to one Vandercook nine thousand eight hundred and sixty (9,860) shares of stock of Yolo County Consolidated Water Company at forty-five ($45.00) dollars per share. This agreement is set forth on pages 6 to 10, inclusive, of the Transcript. The stock was placed in escrow. On the same date Vandercook paid ninety-one thousand two hundred and fifty ($91,250.00) dollars on account of the purchase price (Tr., p. 10). Later on he paid on account of interest and on the unpaid balance of the purchase price sums aggregating thirty thousand eighty-five and 87/100 ($30,085.87) dollars (Tr., p. 11).

He also, in compliance with the agreement, paid out eighty-six thousand sixty and 50/100 ($86,060.50) dollars in acquiring certain properties (pp. 11-12).

By an instrument in writing, the time for making payment of the balance called for by the agreement of purchase was extended to March 24, 1912 (Tr., p. 12).

While the contract was in full force and effect, the defendants notified Vandercook that they rescinded the contract and declared it to be null and void and of no force in law or in equity; also that they would not be bound by it or perform the acts or obligations which the agreement imposed on them. They also took back the stock from the escrow holder and sold it (Tr., p. 13).

Vandercook assigned to plaintiff in error his right to recover back the moneys paid by him on the pur-

chase price and also those paid out by him on account of the contract (Tr., p. 14).

The moneys have not been restored, and hence this suit.

THE JURISDICTIONAL OBJECTION AND THE QUESTION HERE.

It was objected in the Court below that plaintiff's suit is grounded on a chose in action, and that as plaintiff's assignor could not have sued in the Federal Courts, the statute (§ 24 of the Judicial Code) prohibits such suit by his assignee. That section is as follows:

> "No District Court shall have cognizance of any suit . . . to recover upon any promissory note or other chose in action in favor of any assignee . . . unless such suit might have been prosecuted in such court to recover upon said note or other chose in action if no assignment had been made."

The requisite citizenship exists here and it is conceded by the Court below that but for the foregoing provision the jurisdiction would be complete.

Presently we shall show that the phrase "or other chose in action" appearing in the foregoing act has been construed by the courts to be confined to actions founded on contracts and is held not to include actions founded upon some breach of an obligation imposed by law.

And we shall make it clear that this suit is of the

latter class; that is to say, it is founded not upon a contract but upon an obligation imposed by law.

Before doing so, however, we desire respectfully to point out that:

THE LEARNED JUDGE OF THE COURT BELOW FELL INTO TWO FUNDAMENTAL ERRORS.

In his opinion dismissing the suit, the learned Judge says:

> "The facts set out *show that plaintiff is relying upon a contract pleaded by it* and defendants' failure to carry it out. Defendants' defense, if they have any, must also be based upon the contract and upon the failure of plaintiff's assignor to carry it out. The averment that defendants rescinded the contract serves only to confuse the present question; for if we take the averments of the complaint together, we will see that all that is really pleaded is that defendants have attempted to rescind the contract, *as no rescission can be accomplished under the circumstances shown here until the party rescinding 'has restored to the other party everything of value received from him under the contract.'* (Civil Code of Cal., Section 1691.) I am satisfied that plaintiff is suing upon a chose in action, and that as its assignor could not maintain the action in this court, plaintiff cannot do so" (Tr., p. 36).

We respectfully insist that the language quoted embodies two errors:

First: The Court declares that plaintiff is relying on the contract pleaded by it.

On the contrary, plaintiff insists that that contract was abandoned and rescinded and is absolutely extinguished and that, as will be presently demonstrated

beyond doubt, the suit is not brought upon the contract at all.

Second: The Court takes the mistaken view that no rescission could here be accomplished until the defendants followed up their notice of rescission by restoring to the assignor of Plaintiff in Error everything of value received from him under the contract.

That this latter conclusion is contrary to express statute and the decided cases will now be readily demonstrated:

(1) The Rescission Being by Consent, Restoration Was Not Essential to Effectuate It.

A contract may, of course, be rescinded by mutual consent (Civil Code of California, § 1689).

The Code, moreover, expressly states that it is only "when (*the rescission is*) not effected by consent," that he who rescinds must restore what has been received under the contract before a rescission is accomplished (Civil Code, § 1691).

The consent need not be express:

> "Generally, as a contract can be made only by the consent of all the contracting parties, it can be rescinded by the consent of all. But this consent need not be expressed as an agreement. *If either parrty, without right, claims to rescind the contract, the other need not object, and if he permit it to be rescinded, it will be done by mutual consent.*"
>
> *Parsons on Contracts,* § 678, p. 832 (Ninth Ed.).
>
> *"When defendant refused to perform the covenants of the contract on his part, and plaintiff, instead of asserting his*

rights thereunder acquiesced in and assented to such repudiation and demanded the return of the money paid, such facts were sufficient to constitute a rescission of the contract by consent of the parties."

Carter v. *Fox,* 11 Cal. App., 67.

The foregoing quotations and the following illustrate what will constitute consent to a rescission in cases like that at bar:

"The matter directly involved in this action is the right to recover money paid on a contract rescinded by the other party to it. . . . *In other words, he acquiesced in the rescission of the contract on the part of Parlin, and falls back upon his right resulting from such rescission to recover the money paid, laid out and expended while the contract subsisted."*

Heilig v. *Parlin,* 134 Cal., 99, 101.

The acquiescence of the vendee in the rescission referred to in the foregoing quotation consisted solely in suffering a default judgment to be entered against him when the vendor sued to quiet title.

"From the time defendants refused to accept payment and execute a deed, . . . the plaintiff has considered the contract rescinded, and bases this action partly upon that ground, his complaint *stating facts from which a rescission is a necessary inference."*

Drew v. *Pedlar,* 87 Cal., 443, 449.

"The parties may at any time before conveyance rescind the contract by consent, which consent may be express, *or implied from the acquiescence of one party in the acts of the other."*

Maupin on Marketable Title to Real Estate, p. 578.

(2) Upon a Rescission by Consent the Law Imposes an Obligation to Restore What Has Been Received and This Obligation May be Enforced by Suit.

> "One who obtains a thing . . . by a consent afterwards rescinded . . . must restore it to the person from whom it was thus obtained. . . ."
>
> *Civil Code of Cal.*, § 1712.

THIS SUIT IS NOT UPON A CONTRACT.

It is perfectly well settled that if one of the parties to a valid contract fails or refuses to perform it, and without right notifies the other that he rescinds it and will not be bound by it, the latter may, at his election, treat the contract as abandoned and rescinded. If he does this the contract is brought to an end by mutual consent. It ceases to exist. It is in law rescinded. This means that it is extinguished (Civil Code, § 1688), and the amounts which have been paid on the contract may be recovered by suit.

The case at bar is such a suit. It is not brought upon the contract; *for that has been extinguished.* It is brought to enforce an obligation *imposed by law.*

The books are full of cases which illustrate the principle involved and we quote from them:

> ". . . Upon a breach by the vendor of the covenant to convey, what courses are open to the vendee? Obviously these: he may stand upon the contract and sue at law for damages for the breach. Here his recovery will be governed by Sec. 3306 of the Civil Code; or, still standing upon his contract, he may go into equity, seeking its specific performance; or he may sue at law to recover the amount that may have been agreed upon as stipulated

damages; *or, finally, treating the vendor's breach as an abandonment, he may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid, in an action for money had and received; for, the contract being at an end, the vendor holds money of the vendee to which he has no right, and to repay which, therefore, the law implies his promise.*"

Glock v. *Howard, etc. Co.*, 123 Cal., 1, 10.

". . . It may be stated that both parties rely upon a line of decisions which *Cleary* v. *Folger*, 84 Cal., 316, 18 Am. St. Rep., 187, 24 Pac., 280, and *Drew* v. *Pedlar*, 87 Cal., 443, . . . are typical. In the first of these cases the contract of purchase and sale had been brought to an end by the default of both parties; in the second, *a mutual rescission of a similar contract was implied from the acts and admissions of the parties. In each was presented the case of a naked rescission without any agreement between the parties as to the terms, in consequence of which it remained for the law to supply, and the courts to enforce, equitable terms of restoration and compensation, and it was held to be equitable that the purchaser, notwithstanding his default, should recover the amount of his partial payments* less the damage suffered by the vendor by reason of the vendee's breach of contract. This has been the rule of decision in a number of similar cases since decided."

Law Credit Co. v. *Tibbitts*, 160 Cal., 626, 629.

As already pointed out a contract is *extinguished* by rescission (Civil Code, § 1688) and any suit brought to recover part payments made thereunder while it was in force cannot, in the nature of things, be brought on the contract. The foregoing quotations sufficiently emphasize this fact, but the language in the following excerpts says in so many words that the action

does not arise under the contract, and so we quote them:

"Plaintiff bases his claim upon the rule laid down in *Cleary* v. *Folger,* 84 Cal., 316; *Drew* v. *Pedlar,* 87 Cal., 443, and *Phelps* v. *Brown,* 95 Cal., 572. So far as applicable to the facts of this case the rule laid down in those authorities is simply that *when the parties to a contract have abandoned it, or it has been rescinded by mutual consent,* either party may recover money paid under it.

". . . *The action* is based upon the theory that by abandonment or rescission the contract of sale became non-existent, and therefore moneys which had been paid before its cancellation may be recovered as money paid for the use of the person who paid it. **This action is not, therefore, an action arising under the contract of sale."**

Joyce v. *Shafer,* 97 Cal., 335, 337.

"This is not an action arising under the contract, but an action for money had and received (See *Joyce* v. *Shafter,* 97 Cal., 335)."

Shively v. *Semi-Tropic L. & W. Co.,* 99 Cal., 259.

"Treating the vendor's breach as an abandonment he (the vendee) may himself abandon it, when, the contract having thus come to an end, he may sue at law to recover what he has paid, in any action for money had and received; **for the contract being at an end, the vendor holds money of the vendee to which he has no right."**

Glock v. *Howard, etc. Co.,* 123 Cal., 1, 10.

PLAINTIFF IS NOT THE ASSIGNEE OF A CHOSE IN ACTION WITHIN THE MEANING OF THE TERM AS USED IN THE JUDICIAL CODE.

Up to this point we have, we think, made it clear that the conclusions of the learned Judge below were grounded on an incorrect view of the nature of this action and of the law of rescission. His premises were false. But it yet remains to be pointed out that the plaintiff's action is not brought to recover on a chose in action and that the ruling cannot be sustained on any premises that actually exist.

That the claim of plaintiff in error in the case at bar would fall within some of the general definitions of the phrase *"chose in action"* to be found in the books must be conceded. But that phrase as employed in the Judicial Code, has been held to be used in a restricted sense. The phrase was used in the Judiciary Act of 1789 and also in the acts of 1887-8. There, as now, it speaks of "any promissory note or *other* chose in action." The Courts, doubtless under the rule of interpretation *noscitur a sociis,* have in suits by assignees confined the "other" choses in action spoken of in the statute *to claims arising on contract alone,* and have refused to take jurisdiction of such claims, but have not hesitated to take jurisdiction of rights of action based on some obligation imposed not by *contract,* but by the *law.*

THE JUDICIAL CODE HAS NOT FURTHER RESTRICTED THE JURISDICTION.

The cases upon which we must rely have been decided under the earlier acts, since the question has not before arisen under the Judicial Code.

The phrase used in the earlier acts prohibited the Federal Courts from taking jurisdiction in any "suit to recover *the contents* of any promissory note or other chose in action in favor of an assignee," etc.

This language was criticised a number of times by the courts, as "not happily chosen."

Commonwealth S. S. Co. v. *American etc. Co.,* 197 Fed., 785;
Shoecraft v. *Bloxham,* 124 U. S., 730, 735;
Plant Inv. Co. v. *Jacksonville, etc. Ry.,* 152 U. S., 71, 76;
Corbin v. *County of Blackhawk,* 105 U. S., 659.

And when the present Judicial Code was adopted in 1911 the words "the contents of" in the statute of 1887-8 were changed to the word "upon," so that it now reads "suit to recover *upon* any promissory note or other chose in action."

This change, however, did not alter the meaning of the paragraph, for the Judicial Code itself provides:

"Sec. 294. The provisions of this Act, so far as they are substantially the same as existing statutes, shall be construed as continuations thereof, and not as new enactments, and

there shall be no implication of a change of intent by reason of a change of words in such statute, unless such change of intent shall be clearly manifest."

The change in the wording of the statute was obviously made to meet the judicial criticism of the verbiage previously employed. Hence, the decisions under the earlier statute defining what constitutes a chose in action are directly in point.

JURISDICTION NOT OUSTED UNLESS ACTION IS BASED ON AN EXISTING CONTRACT.

The following quotations will make it clear that the choses in action which the Federal Courts must not take jurisdiction of in favor of an assignee, are those brought to enforce rights created by contracts—where the plaintiff *stands upon the contract* and seeks a specific performance of it, or damages for its breach:

"*In Ambler* v. *Eppinger,* 137 U. S., 480 . . . *it is held that the phrase 'chose in action' cannot be construed to include rights of action founded on some wrongful act or some neglect of duty, causing damage, but must be limited to suits founded upon contracts containing within themselves some promise or duty to be performed. In Deshler* v. *Dodge,* 16 How., 622, and *Bushnell* v. *Kennedy,* 9 Wall., 387, *the same construction was given* to the similar phrase found in the eleventh section of the act of 1789; so that it is thus clearly decided by the Supreme Court that the limitation found in the act of 1888, and already cited, cannot be made applicable to claims in the nature of those declared on in the present action, which are for damages resulting from the alleged violation of the duty imposed upon the railway company to charge only legal rates for the transportation of property over its line of railway."

Conn v. *Chicago, B. & Q. R. R. Co.,* 48 Fed., 177.

Simons v. *Ypsilanti Paper Co.,* 33 Fed., 193, is a further recognition of this distinction:

> "From this summary of decided cases it is quite evident that when the action is founded upon an express promise between the original parties it cannot be prosecuted by the assignee of the original promisee, unless the action would have lain by the assignor; but that the statute does not apply to actions of replevin to recover specific chattels, *and* perhaps also *to actions upon implied promises which involve the breach of a legal duty, and which also might be brought in tort as well as in contract.*"

It will be noted that while a possible doubt is suggested in the foregoing language, nevertheless *Conn* v. *Chicago, B. & Q. R. R. Co., supra,* is a later case, and does in fact hold that the statute does not apply to actions based upon a breach of legal duty.

The following cases emphasize the point that the choses in action referred to in § 24 of the Judicial Code, must be confined to those brought for the establishment of some right under an actual existing contract.

Corbin v. *County of Blackhawk,* 105 U. S., 659;
Shoecraft v. *Bloxham,* 124 U. S., 735;
Plant Inv. Co. v. *Jacksonville, etc. Ry.,* 152 U. S., 71;
Deshler v. *Dodge,* 16 How., 631;
Bushnell v. *Kennedy,* 9 Wall., 482;
Buckingham v. *Dake,* 112 Fed., 260.

Now, as is said in *Ambler* v. *Eppinger,* 137 U. S., 480, the phrase "chose in action" must be limited to

suits founded upon *contracts,* and cannot be construed to include "rights of action founded on some wrongful act or some neglect of duty."

We have already pointed out that this suit is not brought upon a contract. It is founded on the wrongful act of defendants in withholding, after the contract had been rescinded and extinguished, the money they had received under it. It is because they have failed to perform a legal duty—an obligation imposed upon them by law—that this action is brought. It is not brought because they have failed to comply with a contract.

The distinction between an action for breach of contract and an action such as that at bar is obvious. If a party stands on the contract and sues for breach thereof, or for liquidated damages for its violation or to enforce it specifically, his action is based on contract. The contract as an existing thing is the foundation of the right in all such cases. The mere breach of a contract does not put an end to it, and damages for the breach arise therefore from the contract. *An action such as the case at bar, on the contrary, is based upon the fact that there is no contract.*

In a similar case the Supreme Court of California has said:

> "From the time the defendants elected to rescind the contract, or to consider and treat it as rescinded, *it was their duty to refund the money they had received under the contract.*"

Drew v. *Pedlar,* 87 Cal., 443, 452.

The duty thus referred to is created by express law. It is one of the obligations laid down in the Civil Code and there denominated an "obligation imposed by law" (Civil Code, § 1712).

> "The contract was at an end and the Nortons were left with plaintiff's money in their hands . . . They could not retain the five hundred dollars as liquidated damages, and therefore *it became their duty* to pay it back."

Phelps v. *Brown,* 95 Cal., 572, 576.

> "The contract being at an end, *the vendor holds money of the vendee to which he has no right,* and to repay which therefore the law implies his promise."

Glock v. *Howard,* 123 Cal., 1, 10.

The fact that the law is thus said to "imply a promise" on the part of the vendor to repay the money to which he has no right, does not mean that any contract to repay the same actually exists. The promise is a pure fiction to permit a convenient remedy in assumpsit for the tortious withholding:

> "The circumstance that a cause of action in point of fact not *ex contractu* is allowed to be sued on in assumpsit and to be described as matter of contract and to be loosely spoken of as implied contract is of no more force to fix its actual character contrary to the truth than is the allegation of loss and finding in trover to convey the sense of a literal loss and finding. Permission to apply the action to a transaction not involving any real contract relation between the parties cannot change the true nature of the transaction and transform it into matter of contract. Courts cannot make contracts for parties. And the fictions and intendments per-

mitted for the sake of the remedy are explainable whenever necessary."

Woods v. *Ayres,* 39 Mich., 345, 349; 33 Am. Rep., 396.

The words of the Massachusetts Supreme Court in *Milford* v. *Commonwealth,* 144 Mass., 64, are also pertinent in this connection:

"A contract is sometimes said to be implied when there is no intention to create a contract, and no agreement of parties, *but the law has imposed an obligation which is enforced as if it were an obligation arising ex contractu. In such a case there is not a contract, and the obligation arises ex lege.*"

The fact that assumpsit will lie on such a claim is, therefore, of no consequence. *Conn* v. *Chicago, B. & Q. R. R. Co., supra,* seems to have been such an action.

Another comparatively recent case (1906) which emphasizes our contention is *Muller* v. *Chicago, etc., Ry. Co.,* 149 Fed., 943. The objection to the jurisdiction was the same made in the case at bar. The facts as well as the conclusions of the Court are shown in the following excerpt:

"It was the legal duty of the Chicago Great Western Railway Company as a common carrier to accept the goods for carriage, and thereupon there attached to it the liability imposed by law upon a common carrier. The complaint does not show that there was any contractual modification of this liability, nor is there any allegation of any express or specific contract between the shipper and the carrier. The complaint states that the defendant 'then and there accepted the same as common carrier, and undertook

> and agreed as such common carrier . . . to carry to Chicago . . . and there deliver to the Chicago, Indianapolis & Louisville Railway Company.'
>
> "The gravamen of the action is the breach of duty imposed by law upon the carrier to carry safely; and the nature of the action is not necessarily changed by the allegation that the defendants agreed to perform the duty that the law imposed upon them. Such an agreement is implied, but is not the foundation of the carrier's duty nor the source of his liability, unless it is evident that the pleader intended to base his right to recover solely upon an express stipulation between the shipper and the carrier."

So also, we submit, it is here of no consequence that the defendants became possessed of the moneys of plaintiff's assignor under a contract. That contract has been extinguished. Upon its extinguishment, they were left with a legal duty to perform. Their failure to perform it is a breach of a duty imposed by law. It is as much of a tortious withholding as if they had found a bag of money and refused to give it over to the owner.

The duty to restore after a rescission what one has received under the extinguished contract, is among the obligations imposed expressly by law. Thus, under the heading "Obligations Imposed by Law," which introduces Part III of the Civil Code, is found § 1712 which, as we have already seen, declares that "One who obtains a thing by a consent afterwards rescinded must restore it":

> "In general, it may be said that whenever the law creates a right, the violation of such right will *be a tort, and wher-*

ever the law creates a duty, the breach of such a duty coupled with consequent damage, will be a tort also. This applies not only to the common law, *but also to such rights and duties as may be created by statute; Cooley, Torts,* 650."

Bouvier's Law Dictionary (Rawle's Revision), Vol. 2, p. 1125.

"That actions on contracts and actions on tort cannot be united is elementary. *The one is based upon the violation of the contract made by the parties thereto. The other is based upon the violation of duties and obligations determined not from the form or contents of any contract, but from the policy of the law.* . . . The one upon the violation of an express contract made by the parties themselves is called an action *ex contractu* . . . The other form of action, based upon violations of the implied contract declared by law, is called an action *ex delicto,* or in tort."

Nelson v. *Great Nor. Ry. Co.,* 72 Pac., 642.

We have in the case at bar a duty cast by express law upon the defendants in error to restore all that our assignor paid them under the extinguished contract. This duty is imposed by the mandate of the law itself. It is a tortious act to withhold this money. Defendants have no right to it. Its detention savors of a conversion. The case is for all essential purposes on all-fours with *Conn* v. *Chicago, etc., supra,* wherein the Court says that the phrase "chose in action" will not include a claim for "damages resulting from the alleged violation of the duty imposed upon the railway company to charge only legal rates." In the

latter case just as in the case at bar the law implied a promise and permitted a suit in assumpsit.

> "Charges made by a railway company, in excess of the regular rate for the carriage of passengers or goods, may be recovered back in an action for money had and received, railway companies being under the statutory obligations to charge all persons equally, and after the same rate under the same circumstances."

Leake on Contracts (5th Ed.), page 62.

CONCLUSION.

In the foregoing pages we have endeavored to show that the suit at bar is not brought to recover on a "chose in action" as that phrase is to be understood in the 24th section of the Judicial Code; that said section is confined exclusively to suits based on contracts in fact; that this suit is not brought upon a contract at all, but is brought because of the violation of an obligation imposed by law; that such violation is tortious and is a breach of an obligation imposed, not by contract, but by law.

We also have shown, we think, that the learned Court below came to the conclusion that it did, owing to a misconception both as to the nature of the action, and also as to the steps necessary to accomplish a rescission of a contract by mutual consent.

For these reasons we ask that the judgment be reversed.

Respectfully submitted.

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